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CURRENT TOPICS

It very rarely happens that judges are found in so much confusion as those of the Missouri Supreme Court in State v. Jennings. A mare caused the whole trouble, and Jennings was unfortunate enough to be found in possession of the animal soon after the larceny. The accused had two witnesses subpoenæd, and upon their failure to appear, attachment issued, which was unavailing, they evidently having betaken themselves beyond the State borders. The prisoner, in the language of Judge Sherwood, "vainly begged for brief delay; vainly insisted on his blood-bought constitutional right, 'as a lamb to the slaughter and as a sheep before her shearers,'" to have compulsory process to obtain his witnesses. The court was deaf "to the best emotions of our common humanity," and refused to allow a continuance, upon the district attorney (the representative of cruel persecutors) consenting that the expected testimony of the witnesses, should go to the jury as if they had personally so testified. This action Judge Sherwood characterized as "worthy alone of twelve butchers for a jury and Jeffries as a judge." The other judges, we regret to say, felt no such shock to humanity as that supposed by Judge Sherwood, and upheld the action of the trial court. But there was another bone of contention. The court instructed the jury that from recent unexplained possession of stolen property, the law presumed guilt. This point has been decided in Missouri before; but the defendant's counsel conceived tnat there was nothing like trying to persuade the court to reverse its decision. Judges Henry and Hough succumbed and agreed with him, but the majority of the court adhered to the old decision. Judge Sherwood evidently exhausted by his high sounding dissenting opinion on the first point, thought it best to agree with Judge Norton and Ray upon the second. We confess that we experience great pleasure in reading Judge Sherwood's opinions, but we most decidedly object to the employment of such violent language by one supposed to be an impartial arbiter.

The old application of the rule *volenti non fit injuria* to the case of two agreeing to fight has been recently rejected by the Supreme Court of Wisconsin, in Shay v. Thompson. It holds that where two voluntarily fight, either can maintain an action against the other for the actual damage sustained by him. There are two or three cases which support this conclusion, but we believe the weight of reason and authority to be against it. When two parties agree to fight, each knowing that damage is to be the only result of their foolishness, they each solicit such injury, and it should be beneath the dignity of a civil court to listen to the plaints of either, to say nothing of the sound rule that no man can be heard to ask relief from the consequences of his own wrongful act. But the court says that the fighting is unlawful and that public policy forbids such agreement. Certainly; and public policy should forbid either party to ask relief from damage which he invites. It is not for the interest of the fighters that the act is denounced as unlawful. It is the injury to the public which stamps upon the fight its unlawful character; the criminal law is not invoked to aid the parties. The consequences which may flow from the decision condemn its wisdom even if it is sound from a judicial standpoint.

In connection with the case of Moody v. Jacksonville, recently reported in the Journal, it will be well to note the recent decision of the Supreme Court of Wisconsin in Smith v. Gould, to the effect that an act is not unconstitutional merely because it does not provide for actual payment in advance for land taken for public use. The property of the town, according to the court, constitutes a pledge to which the owner can resort for payment in the manner prescribed by statute.

MALICIOUS PROSECUTION OF CIVIL CASES.

By the common law, prior to the enactment of the Statute of Marlbridge,[1] an action would lie for for the bringing of a malicious suit, and the action was maintainable, whether or not, the defendant's property was seized, or any expense incurred in defending the same; and then, as now, the bringing of a civil action, was regarded as a matter of right and the plaintiff was liable in damages for the malicious institution and prosecution of such an action, without probable cause. By this statute, court costs were given to the defendant in the event the plaintiff was non-suited, or failed to recover; and since the enactment thereof, there has been a long line of decisions to the effect that the bringing of a civil suit, maliciously and without probable cause, was not a ground upon which an action could be maintained. "This entire doctrine," says Justice Pryor,[2] "is based on the idea that the plaintiff bringing the action is sufficiently punished, and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs."[3] "But," says the Justice, "we perceive no good reason for following this rule, and deny to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *per falsum clamorem*, is no recompense to the defendant when the latter has, by reason of the malicious proceeding on the part of the plaintiff sustained damage." At the present time it is fully settled that a malicious prosecution, without probable cause, of civil proceedings, "involving arrest, attachment, sequestration, or other interference with person or property, or which is the cause of any special grievance, or injury, will according to the general current of authority, give a right of action."[4]

Whether a civil suit, prosecuted maliciously and without probable cause, where there is no seizure of the defendant's body, or goods, will be a sufficient ground for an action, is a question upon which the authorities are divided. In this article, written in the light of the weight of late decisions, the writer will contend that the true doctrine, is that doctrine which gives a right of action to one who has been maliciously and without probable cause, prosecuted in a civil suit. It is a wrong to disturb one's property or peace; and to prosecute one maliciously and without probable cause is to do that person a wrong; and to not allow an action for such a prosecution would be against the well established common law principle, that there is no wrong without a remedy.[5] If one is injured in his person, he has his remedy by which he may be compensated to the extent of his injury; if one is injured in his reputation, the courts are open for his redress; if one is injured in his prop-

1 52 Henry III (1267).

2 Woods v. Finnell, 13 Bush. 628.

3 Savile v. Roberts, 6 Mod. 73, n.; s. c., 3 Salk. 16; 1 Ld. Raym. 374; Eberly v. Rupp, 9 Nor. 259; Mayer v. Walter, 1 P. F. Smith, 583; Kramer v. Stock, 10 Watts, 115; Woodmansie v. Logan, 1 Penn. (N. J.) 67; Parker v. Langley, Gilbert's Cases, 161; Patts v. Imlay, 1 Southard, 330; Muldroon v. Rickey, 17 Cent. L. J. 341. The earlier American decisions, to a considerable extent, followed this rule of the English courts. In Woodmansie v. Logan, 1 Penn. (N. J.) 67, decided in 1806, Chief Justice Kirkpatrick says: "It is clearly established in our books, that for commencing a civil action, though without sufficient cause, no action on the case for a malicious prosecution will lie. Every man is entitled to come into a court of justice and claim what he deems to be his right."

4 Watkins v. Baird, 6 Mass. 506; Lawrence v. Hogerman, 56 Ill. 68; Collins v. Hayte, 50 Ill. 353; Stewart v. Cole, 46 Ala. 646; McKellar v. Couch, 34 Ala. 336; Donnell v. Jones, 13 Ala. 490; s. c., 17 Ala. 689; Tancred v. Leyland, 16 Q. B. 669; Herman v. Brookerhoff, 8 Watts. 240; Henderson v. Jackson, 9 Abb. Pr. (N. S.) 393; 3 Sutherland on Damages, 699; Cox v. Taylor, 10 B. Mon. 17; Robinson v. Kellum, 6 Cal. 399; Preston v.Cooper, 1 Dill.489; DeMedina v. Grave, 10 Q. B. 168; Savage v. Brewer, 16 Pick. 453; Burkhart v. Jennings, 2 W. Va. 242; Fortman v. Rattier, 8 Ohio St. 548; Tomlinson v. Warner, 9 Ohio, 103; Nelson v. Danielson, 82 Ill. 545; Spaids v. Barrett, 57 Ill. 289; Farley v. Danks, 4 El. & Bl 493; Sinclair v. Eldred, 4 Taunt. 7; Austin v. Debnam, 3 B. & C 139; Churchill v. Siggers, 3 El. & Bl. 937; Besson v. Southard, 10 N. Y. 236; Barhaus v. Sanford, 19 Wend. 417; Pierce v. Thompson, 6 Pick. 193; Weaver v. Page, 6 Cal. 681; Lindsay v. Larned, 17 Mass. 190; Hayden v. Shed, 11 Mass. 500; Welser v. Thies, 56 Mo. 89; Holliday v. Sterling, 62 Mo. 331; Williams v. Hunter, 3 Hawks. 545; s. c., 14 Am. Dec. and notes; McCullough v. Grishobber, 4 W. & S. 201; Spengler v. Davy, 15 Gratt. 381; Wood v. Wier, 5 B. Mon. 544; Fullenwider v. McWilliams, 9 Bush. 389; Closson v. Staples, 42 Vt. 209; Hoyt v. Macon, 2 Colo. 113; Patts v. Imlay, 7 Am. Dec. 603, and notes; Cooley on Torts, 187; 1 Hilliard on Torts, 443; Mayer v. Walter, 64 Pa. St. 283; McNamee v. Minke, 9 Cent. L. J. 42; Sledge v. McLaven, 29 Ga. 64; O'Grady v. Julian, 34 Ala. 88; Bump v. Betts, 19 Wend. 421; Whipple v. Fuller, 11 Conn. 582. For a discussion of the question, see the note to Frowman v. Smith, 12 Am. Dec. 265.

5 Cooley on Torts, p. 19.

erty, an action will lie. In Bump v. Betts,[6] Chief Justice Savage, in discussing this question, states the rule to be, that "the action lies against any person who maliciously and without probable cause, prosecutes another, whereby the party prosecuted sustains an injury, either in person, property or reputation." To be the defendant in a malicious suit, certainly has some effect upon one's property. The money expended in defense of the suit, to that extent and amount injures the property of the defendant.[7] One of the latest cases upon the subject is that of McCardle v. McGinley.[8] The complaint in the court below, for damages on account of the malicious prosecution alleges that McCardle maliciously and without probable cause sued McGinley upon a false and groundless account, and that he (McGinley) had been put to great trouble and expense in defending said action, in procuring witnesses, employing counsel, and in many other ways. The allegations in the complaint were found to be true by the jury, and an appeal was taken by McCardle, and the court says, "It is too clear for discussion that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless civil action. The party sued must devote some time to the defense of the suit; he must look up his evidence and employ counsel. This waste of time and necessary expediture of money, by its results, affects the property of the defendant. For these expenses the costs recovered in the action are no compensation at all. In some of the States reasonable attorney fees for the successful party are included in the taxable costs. It is not so here. No good and sufficient reason can be given why he who has maliciously and without probable cause instituted a suit against another should not be required to pay the party so sued such sum as will make him entirely whole. And so a majority of the decided cases in this country hold."[9]

"We are of the opinion," says the court in Classon v. Stapels[10] "that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defense of that original suit in excess of the taxable costs obtained by him; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment, or, by summons only." "If a party falsely and maliciously and without probable cause, put the law in motion, it is properly a subject of an action on the case."[11] "So also if two or more persons conspire to vex and harass any person with groundless and malicious civil suits, they were not only punishable criminaliter, but liable to a civil action."[12] "If a man sue me in a civil suit, yet if his suit be utterly without ground, and that certainly known to himself, I may have an action against him for the damage he putteth me unto by his ill practice."[13]

[6] 19 Wend. 421.

[7] McCardle v. McGinley, 86 Ind. 538, decided November, 1882; Woods v. Finnell, 13 Bush. 628; 2 Cooley's Blackstone, 1:6, notes. In support of our position, see article of John D. Lawson Esq., in 21 Am. Law Reg., 369.

[8] 86 Ind., 538.

[9] McCardle v. McGinley, 86 Ind. 538; Lockenour v. Sides, 57 Ind. 360, S. C. 26 Am. Rep. 58; Closson v. Staples, 42 Vt. 209, S. C. 1 Am. R. 316; Whipple v. Fuller, 11 Conn. 582; Marbourg v. Smith, 11 Kan. 554; Burnap v. Albert, Taney Cir. Ct. 244; Cox v. Taylor, 10 B. Mon. 17. But in Thomas v. Rouse, 2 Brev. 75, decided in 1806, Justice Brevard says, that "To bring a civil action, though there should be no ground for it, is not actionable, unless for consequential damages." In some cases a special grievance is necessary to make the action lie. In Mayer v. Walter, 64 Pa. St. 283, it is held that this is necessary and that "A mere suit, however malicious, causeless, or injurious, will not be a ground of action, because the recovery of costs is sufficient, both as a remedy and as a penalty." In McNamee v. Minke, 9 Cent. L. J. 42, it is held "that an action for malicious prosecution lies only where there is peculiar injury; such as malicious and groundless arrest, or, seizure of property, or putting in bankruptcy, or the like, and that it is not sufficient to aver a prosecution of a civil action maliciously, and without cause by which the plaintiff was put to great charge etc., but that special grievance must be alleged and proved." See Kramer v. Stock, 10 Watts, 115; Eberly v. Rupp, 9 Nor. 259.

[10] 42 Vt. 209, S. C. 1 Am. Rep. 316.

[11] Elsie v. Smith, 2 Chitty Eng. Eccl. 345.

[12] Staundford P. C. 172; 1 Inst. 561; Co. Litt. 161, A.

[13] Watson v. Freeman, Hob. 205. The English cases of a recent date have to a great extent changed the old rule. The action now is allowed where special damages are made out. If special damages results from a claim made to goods, an action against the claimant may be maintained, if the claim be made maliciously, and without any reasonable or probable cause. See Green v. Button, 1 Gale, 346, S. C. 1 Tyr. & G. 118. And it is a sufficient special damage that one with whom a contract has been made for the sale,

The action will lie against one who maliciously and without probable cause, brings successive suits against another, returnable before a justice at a distant place, dismissing the suits upon an appearance, and causing trouble and expense.[14] One may by malicious intermeddling put in motion the machinery of the law, and cause another great trouble and expense, and for so doing an action will lie.

The case of Hoyt v. Macoul[15] was for damages for the malicious intermedling with the plaintiff's business, who was at that time a pre-emptioner. In deciding this case Justice Wells says, "If one citizen may so intermiddle, and, by a false suggestion that the pre-emptioner is not the head of a family, compel him to attend with his witnesses to establish his qualifications in this respect, another may compel him to renew the same journeyings and expenses by a like suggestion against his citizenship, and a third by questioning his settlement, and others upon other grounds; and so, if the pre-emptioner be of that class for whose especial benefit the statute was framed, it may well be conceived that he will eventually be compelled to abandon his right from sheer exhaustion. I think, therefore, that it ought not to be said that one may intermeddle to resist his neighbor's application to have the benefit of the act of Congress, out of mere malice, and without cause, and not be liable over for the wrong," and, further, says the court, "Upon principle I conceive no distinction ought to be made between the case where one, out of malice merely, and without probable cause, sets in motion the machinery of the law to the injury and oppression of his neighbor, and that other class of cases, where one from the same motive unwarrantably interferes in a matter in which he is not directly a party, to delay, or prevent another from obtaining that to which he is entitled." So an action will lie for proceedings to declare one insane without probable cause.[16] In Lockenour v. Sides,[17] the action was for damages for the alleged malicious institution of proceedings to have one declared insane, and Justice Worden says: "The proceedings to procure the plaintiff to be found insane and to place him under guardianship, are not entirely like a civil action, in which the plaintiff therein claims some right in his own behalf. If the proceedings were instituted and carried on by the defendant maliciously and without probable cause, as alleged, the defendants were officious intermeddlers, without any claim of right or interest in the matter; and they are, in our opinion, liable to the plaintiff for the damages, in excess of the taxable costs, sustained by him by means of the proceeding." And an action will lie for suing out and instigating a malicious proceeding in bankruptcy;[18] and in cases of malicious abuse of legal process;[19] or for maliciously

of the goods refuses to deliver them in consequence of the claim. Green v. Button, 1 Gale. 349. But by the English courts an action on the case to recover damages against the lessor of the plaintiff, in a vexatious ejectment, is not maintainable. See Burton v. Honnor, 1 B. & P. 205.

[14] Payne v. Duncan, 9 Ill. App. 566. But in the case of Patts v. Imlay, 1 Southard (N. J.) 330, decided in 1816 the contrary doctrine is held. In this case the action is brought for the malicious bringing of suits, and upon appearance, dismissing the same. Chief Justice Kirkpatrick, says, "The books have been searched for four hundred years back, and upon that search, it is conceded even by the counsel for the plaintiff below, himself, that no case can be found in which this action has been maintained in circumstances similar to the present." The case of Muldoon v. Rickey, a recently decided case by the Supreme Court of Pennsylvania, and noticed in 17 Cent. Law Journal 341, tries to apply the above doctrine as stated by Justice Kirkpatrick; but the cases are far different; that of Muldroon v. Rickey, was for the bringing and prosecution of a malicious action in ejectment. In the leading case, on this side of the question, of Savil v. Roberts, in Salk 15, decided about 1270 Chief Justice Holt, says. "In a civil action the defendant has his costs, and the plaintiff is amerced for his false claim. To bring a civil action, therefore, though there be no ground, is not actionable, because it is a claim of right in the kings courts, to which every subject may have resort, and he has found pledges, is amercible for his false claim and liable to costs. It is not enough to declare that such action was *ex malitia et sine causa, per quod*, he was put to great charges; he must go further; he must show special grievance, as that the prosecutor had no cause of action, or cause of action only to a small sum, and that he had sued out a *latitat* for a large sum with intent to imprison him, or do him some special prejudice."

[15] 2 Colo. 113.

[16] Sonneborn v. Stewart, 2 Woods, 599; s. c. 98 W. S. 187; Brown v. Chapman, 1 W. Bl. 427; Chapman v. Pickersgill, 2 Wils. 145; Turner v. Turner, Gow. 50; Lockenour v. Sides, 57 Ind. 360.

[17] 57 Ind. 360.

[18] Brown v. Chapman, 3 Burr, 1418; s. c. 1 W. Bl. 427; Chapman v. Pickersgill, 2 Wils. 145; Tarley v. Danks. 4 El. & Bl. 493; s. c. 24 L. J. Q. B. 244; Johnson v. Emerson, 25 L. T. (N. S.) 337; Whitworth v. Hall, 2 B. & Ad. 695.

[19] Kreig v. Ward, 77 Ill. 603; Savage v. Brewer, 16 Pick. 453; Churchill v. Siggers, 2 El. & B. 929. "To put into force the process of the law," says Lord Campbell, "maliciously and without any reasonable or probable cause is wrongful; and if thereby another is prejudiced in property or person, there is that con-

suing out an injunction;[20] and so, if a mortgage creditor contract with his debtor not to enforce his mortgage within a given time, but subsequently does so, the latter has a right to sue for the actual injury without alleging malice, or want of probable cause.[21] The action lies, although the defendant was not the originator of the malicious suit;[22] or, against a judge for conspiring to institute a malicious prosecution in his own court.[23] It is said that no action will lie, however, for a prosecution in a court not having jurisdiction.[24]

Malice and Probable Cause.—To maintain the action it is necessary that there be both malice and a want of probable cause.[25] The voluntary discontinuance of a malicious suit is *prima facie* evidence of want of probable cause.[26] The want of probable cause raises a presumption of malice,[27] but the want of probable cause can not be implied from the most express malice.[28] Generally, an indebtedness would be considered a probable cause, yet the action will lie, even where the suit was instituted for a debt really due, if there was a malicious abuse of the legal remedies to the debtor's damage;[29] and probable cause does not necessarily relate to the cause of action; thus where an attachment is maliciously sued out, where there is some indebtedness, the action will lie.[30]

Measure of Damages.—The great trouble and expense that one may be put to in the defense of a malicious suit can scarcely be measured. Mr. Sutherland in his work on damages,[31] says that "the expense and trouble of defending such an action are proper elements of damage, and why should they alone not be considered sufficient to maintain the action? Where the claim which is the subject of the action is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached, or his body taken in charge by the plaintiff."[32] The attorney fees expended in the defense of a malicious suit, is a necessary expense caused by malice, and is a part of the damage for such an action;[33] but the attorney fees expended for bringing the action for damages on account of the malicious suit, is no part of the damages.[34]

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junction of injury and loss which is the foundation of an action on the case."

20 Robinson v. Kellum, 6 Cal. 399, Cox v. Taylor, 10 B. Mon. 17. But in Gorton v. Brown, 27 Ill. 489, it is held that the action will not lie, that the remedy is on the bond; but we take it that this is not the correct rule. We think the rule to be that where there has been a malicious prosecution by suing out an attachment or injunction that the right of action, for such malicious and unfounded suit, is not lost to the injured party, because he has also a remedy on the statutory bond. See Drake on Attachment, sec. 154. Lawrence v. Hagerman, 56 Ill. 68; s. c. 8 Am. Rep. 674; Donnell v. Jones, 13 Ala. 490; Robinson v. Kellum, 6 Cal. 399; Cox v. Taylor, 10 B. Mon. 17; Burnap v. Wight. 14 Ill. 301. Nor will the injured party to a malicious suit loose his right of action by waiver, by a submission of the same to referees; 2 Hilliard's American Law, 269.

21 Juchter v. Boehm, 21 Am. L. Reg. 272; s. c. 66 Ga.

22 Stansbury v. Fogle, 37 Md. 369.

23 Stewart v. Cooley, 23 Min. 347.

24 Painter v. Inez, 4 Neb. 122.

25 Sledge v. McLaven, 29 Ga. 64; O'Grady v. Julian, 34 Ala. 88; Spengler v. Davy, 15 Grat. 318; Burkhart v. Jennings, 2 W. Va. 242; Holliday v. Sterling, 62 Maine, 321. See note to Frowman v. Smith, 12 Am. Dec. 265. But *contra*, see Kirkham v. Coe, 1 Jones L. 423.

26 Burhaus v. Sanford, 19 Wend. 417.

27 Bozeman v. Shaw. 21 Am. Law Reg. 348; s. c. 37 Ark.; Decoux v. Lieux, 33 La. An. 392; Block v. Meyers, 33 La. An. 776; s. c. U. S. Digest (1882), 589; Turner v. Turner, Gow. 50.

28 Plummer v. Gheen, 3 Hawks, 66; s. c. 14 Am. Dec. 572.

29 Herman v. Brookerhoff, 8 Watts, 240.

30 Tomlinson v. Warner, 8 Ohio, 103; Spalds v. Barrett, 57, Ill. 289; Savage v. Brewer, 16 Pick. 453.

31 3 Sutherland on Damages, 701.

32 Woods v. Finnell, 13 Bush. 628.

33 McCardle v. McGinley, 86 Ind. 538; Jauchter v. Boehm, 21 Am. L. Reg. 272.

34 Stewart v. Sonneborn, 98 U. S. 197; Good v. Mylin, 8 Pa. St. 51; Alexander v. Herr, 11 Pa. St. 537; Stopp v. Smith, 71 Pa. St. 285; Hicks v. Foster, 13 Barb. 424.

DISCHARGE AND FORFEITURE OF RECOGNIZANCES.

Act of the Law.—A second arrest by the State has always been considered a complete excuse for the forfeiture of the bond,[1] especially if he gives second bail;[2] but not, it seems, if he escapes after conviction of the

1 People v. Bartlett, 3 Hill, 570; May v. Wright, 5 Metc. 380; People v. Sager, 10 Wend. 43; Olcott v. Lilley, 4 Johns. 407; Cooper v. State, 5 Tex. App. 215; Wheeler v. State, 38 Tex. 173; Peacock v. State, 44 Tex. 11.

2 Peacock v. State, *supra*.

second offense.[3] But it is no excuse that he was re-arrested and bailed, and that he fulfilled the condition of the second recognizance, when all these proceedings took place after forfeiture.[4] If the Governor of the State obeys the requisition of the Governor of another State for the accused, the sureties are discharged.[5] In some cases the rule is laid down that an arrest in another county by the State does not prevent a forfeiture on the ground that such arrest should have been called to the attention of the court and a continuance obtained, so that *habeas corpus* might be brought against the officers of the second county.[6] An arrest in another State is, however, of no avail to the sureties. They should not allow the principal to go beyond the limits of the State; or he goes at their peril. Each State is foreign to each other, and by the acts of one, another can not be prejudiced.[7]

Act of God.—The sickness of the principal at the time that the appearance should be made, excuses the forfeiture.[8] So death of the principal is an excuse for breach of the bond;[9] provided it occurs before forfeiture.[10] But it has sometimes been held that if the death occurs before judgment on the recognizance, it relieves the sureties.[11] But the insanity of the accused, which necessitates his removal to an insane hospital in another State, affords no reason why the recognizance should not be declared forfeited.[12] In Piercy v. People,[13] the principal was dangerously ill in another State, and could not be surrendered without great danger of his life; and this was held not to exonerate the sureties on his bail bond. "Nothing but the death of the principal is such an act of God as wil discharge the sureties under the law."

Defenses. — An acquittal *ipso facto* discharges the bond;[14] so an entry of *nolle prosequi* upon the record.[15] But the contrary is maintained in South Carolina.[16] But payment of a fine for a breach of the peace is no defense to *scire facias* on a recognizance given to keep the peace.[17] The loss of the indictment;[18] or the finding of no indictment is no defense.[19] Neither is it a defense that the recognizance was entered into by the accused under duress;[20] nor that the grand jurors who found the indictment were disqualified;[21] nor that the officer taking the recognizance had no authority;[22] though the contrary is held in Kentucky;[23] nor that the bond was executed on Sunday;[24] nor that the indictment was defective;[25] or void;[26] *a fortiori*, if they do not bring the accused into court.[27] The State is entitled, at least, to a surrender of the prisoner. So it would be of no avail to show that the recognizance stipulated that the principal should appear and answer the charge of assault, and that he was indicted for murder;[28] or that he was convicted of a lesser offense than that charged in the indictment;[29] or that the judgment of forfeiture was erroneous;[30] or that the bail

[3] Hendee v. Taylor, 29 Conn. 448; Wheeler v. State, 38 Tex. 173. But see *contra*, Medlin v. Cross. 11 Bush. 605.

[4] People v. Annable, 7 Hill, 33; Ingram v. State, 27 Ala. 17; State v. Schmidt, 13 La. 267; Chambers v. State, 20 Tex. 197; Barton v. State, 24 Tex. 250; Chappel v. State, 30 Id. 618; State v. Burnham, 44 Me.

[5] State v. Adams, 3 Head, 259; State v. Allen, 2 Humph. 258.

[6] Alquine v. Commonwealth, 3 B. Mon. 394; Mix v. People, 26 Ill. 32; Brown v. People, 26 Ill. 28. Compare Ingram v. State, 27 Ala. 17.

[7] Devine v. State, 5 Sneed. 623; Withrow v. Commonwealth, 1 Bush. 17; State v. How, 70 Mo. 466; Taintor v. Taylor, 36 Conn. 242; s. c., 16 Wall. 366; United States v. Van Fossen, 1 Dillon, 406.

[8] People v. Tubbs, 37 N. Y. 586; People v. Manning, 8 Cow. 297; —— v. ——, 45 Ga. 9; Chase v. People, 2 Colo. 481; Commonwealth v. Craig, 6 Rand (Va.), 731.

[9] People v. Manning, 8 Cow. 297; Parker v. Bidwell, 3 Conn. 84.

[10] State v. Scott, 20 Iowa, 62; McLelland v. Chambers, 1 Bibb. 366; Glyn v. Yates, 1 Strange, 511; Barry v. Barry, 2 Strange, 717; State v. McNeal, 18 N. J. L. 333.

[11] State v. Cone, 32 Ga. 663; Wolfolk v. State, 10 Ind. 532.

[12] Alder v. State, 35 Ark. 519.

[13] 10 Bradwell (Ill. App.), 219.

[14] Mills v. McCoy, 4 Cow. 406; Lafton v. Monton, 8 La. Ann. 489.

[15] State v. Langton, 6 La. Ann. 282.

[16] State v. Hackett, 3 Hill (S. C.), 95.

[17] Commonwealth v. Bray, 6 Pick. 113.

[18] Crouch v. State, 25 Tex. 755.

[19] State v. Cocke, 37 Tex. 185; Pack v. State, 23 Ark. 235; State v. Stout, 6 Halsted, 139. *Contra*, in Brown v. State, 6 Tex. App. 188.

[20] Archer v. Commonwealth, 10 Gratt. 627. *Contra*, 4 Park. Cr. Cas. 45.

[21] Sharp v. Smith, 59 Ga. 707.

[22] Pack v. State, 23 Ark. 235.

[23] Commonwealth v. Roberts, 1 Duvall, 199.

[24] Watts v. Commonwealth, 5 Bush. 309.

[25] Brown v. State, 6 Tex. App. 188; Commonwealth v. Skeggs, 3 Bush. 19; Little v. Commonwealth, Id. 22.

[26] State v. Reese, 4 Sawyer, C. C. 629.

[27] State v. Rhodins, 37 Tex. 165.

[28] Pack v. State, 23 Ark. 235.

[29] Campbell v. State, 18 Ind. 375.

[30] People v. Wolf, 16 Cal. 385. *Contra*, in People v. Budd, 57 Cal. 349.

was raised and a new order of arrest issued and the accused hearing of the proceedings through the negligence of the officers, absconded;[31] or that the indictment was not entered at the term at which it was found.[32] But it seems that a good defense will be made out if it can be shown that the bond recites no crime against the laws;[33] or that the court had no authority to require the principal to answer the charge against him;[34] or that in the recognizance the crime of assault and battery, or assault with intent to kill, was recited, and the indictment was for aggravated assault.[35]

Presence of Defendant in Court.—When the accused has been indicted for a misdemeanor it has been questioned whether the surety can appear as the attorney of the principal, demand a trial and thus prevent the forfeiture of the bond.[36] But the same court afterwards decided that he had such right;[37] and if a verdict of acquittal is rendered, he is discharged.[38] The mere absence of the principal when called will not warrant a declaration of forfeiture.[39] But it has been held that this doctrine can not be extended to allowing the surety to plead to the indictment and offer to pay the fine and costs, to save a forfeiture.[40]

Discharge by Conduct.—The failure on the part of the government to hold the term of court at which the accused is required to appear does not discharge the sureties[41] even though no notice be given. So the neglect of the government to call the principal at the next term of the court does not relieve the sureties of the duty of compelling his appearance at a subsequent term,[42] not even though he appears and the court refuses to try the cause or to make any order therein[43] or condition.[44] The mere appearance of the principal in discharge of his recognizance, without an order of court to take him into custody is without effect.[45] But the doctrine has gained support that if the principal presents himself at the return term and no measures are taken to commit him or otherwise to secure his appearance at any subsequent term, the sureties are discharged at the adjournment of the term.[46] So if a defendant charged with felony appear upon the day named in the recognizance, plead to the indictment, is put upon trial, and by order of the court, placed in the sheriff's custody from whom he escapes during the progress of the trial, the sureties are relieved.[47] In Georgia the principal is not obliged to appear until an indictment is found against him although the bond is conditioned that he should appear at the next term.[48] But the contrary opinion prevails in Indiana;[49] yet even in that State, if the accused appears during the term, the sureties will be discharged.[50] The recognizance is not discharged by the commencement of the trial; a surrender or re-arrest is necessary to relieve the sureties.[51]

The government can not alter the position o the parties without the consent of the sureties. So where the recognizance was conditioned that the principal should appear at the next term of court and also at any subsequent term to be thereafter held and he appeared at the next term, and the case was continued without the consent of the sureties, until a decision should be reached in some collateral suits, but he soon disappeared, the court said "the provision for his appearance had reference to such subsequent term as might follow in regular succession in the course of business of the court. It was inserted to obviate the necessity of renewing the bail every time the cases were from any cause, continued from one term to

31 People v. Eaton, 41 Cal. 657.
32 Seat v. Spear, 54 Vt. 503.
33 Foster v. State, 27 Tex. 236, overruling Wilson v. State, 25 Tex. 169; Nicholson v. State, 2 Ga. 363.
34 McGee v. State, 11 Tex. App. 520.
Foster v. State, 27 Tex. 237; Duke v. State, 35 T. 424.
35 People v. Wolf, 16 Cal. 385.
37 People v. Budd, 57 Cal. 349.
38 United States v. Santos, 5 Blatch 154.
39 People v. Budd, 57 Cal. 349.
40 Warren v. State, 19 Ark. 217.
41 State v. Brown, 16 Iowa, 314.
42 Gentry v. State, 22 Ark. 544.
43 Archer v. Commonwealth, 10 Gratt, 627.
44 Wilson v. State, 6 Blackf. 112; People v. Steger, 10 Wend. 431.

45 Commonwealth v. Coleman, 2 Met. (Ky.) 182; Billings v. Avery, 7 Conn. 235.
46 State v. Mackey, 55 Mo. 51; Keefhaver v. Commonwealth, 2 Penn. 2. 240; Smith v. People, 1 Park Cr. Cas. 317, Swank v. State, 30 Ohio, St. 429.
47 Commonwealth v. Coleman, 2 Metc. (Ky.) 382; Askins v. Commonwealth, 1 Duvall, 275.
48 Liceth v. Cobb, 18 Ga. 314; State v. Lockhart, 24 Ga. 420.
49 Flucer v. State, 25 Ind. 384.
50 Adair v. State, 1 Blackf. 390; See Chaplain v. People, 2 N. Y. 82.
51 People v. McCoy, 39 Barb. 73; State v. Brown, 16 Iowa, 314; See Bryant v. Commonwealth, 3 Bush, 9.

another. It was not intended to apply to any distant future term to which the trial might be postponed. The stipulation to postpone the trials until after such final disposition was inconsistent with the recognition of the recognizance. It substituted for it an agreement that he need not appear at any such subsequent term but only at such term as might be holden after the happening of an uncertain and contingent event. The stipulation made without their consent or knowledge, between the principal and the government has changed the character of his obligation; it has released him from the obligation with which they covenanted he should comply and substituted another in its place." After referring to the general incidents of bonds, it adds "sureties are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the changes or even that it may be of advantage to the sureties. They have a right to stand upon their undertaking."[52]

Surrender.—The undertaking of the bondsmen being entirely gratitutous, they are entitled to put an end to their responsibility at their pleasure, and the State is bound to accept the principal in surrender.[53] "By the recognizance says Field J. in Ruse v. United States[54] "the principal is in the theory of the law committed to the custody of the sureties as to jailers of his own choosing not that he is in point of fact, in this country at least, subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power, that they may at any time arrest him upon the recognizance and surrender him to the court and to the extent necessary to accomplish this, may restrain him of his liberty." And the bail may not only themselves make the arrest, but may commission any person to act for them.[55] And if it becomes necessary, in order to arrest him, to break the outer doors of his house,such action is proper;[56] but before doing so, the bail should first signify the cause of his coming and request admission,[57] unless the personal safety of the bail or his substitute is in hazard from the intended threatened violence of the principal, when he may proceed to demolition without any preliminary step. If the defendant surrenders himself to the sheriff, the bond is discharged.[58] But a surrender to a deputy sheriff is no discharge;[59] it must be made to the court at which he has bound himself to appear if in session and if not, to the committing magistrate who took the recognizance.[60] If the principal appears in compliance with the recognizance and gives new bail, this operates as an accepted surrender.[61] But where a prisoner was brought into court by his bail, and it was announced publicly that he was surrendered, but he was unknown to the sheriff and to the government attorney, and a stranger to everyone except the bail and the judge who ordered him in custody, whereupon he fled from the court room and escaped, it was held that these facts did not amount to a valid surrender, although it was so adjudged by the court at the time, and a record to that effect was made.[62] And to make a surrender valid, it must be made during the life of the bond, in other words, before a forfeiture is declared;[63] and if the bail arrest their principal after forfeiture, for the purpose of surrendering him, this arrest is unauthorized, and they are liable to him for false imprisonment.[64]

Forfeiture.—Before the liability of the sureties attaches the principal must be solemnly called, and his default declared and recorded.[65] "This is far from being a matter of form only," said the learned Judge, "it is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused." The forfeiture must be declared at the term at which the default occurred, or the sureties will be discharged. If declared at a subsequent term it will be inoperative.[66]

[52] Reese v. United States, 9 Wall, 13.
[53] Harpe v. Osgood, 2 Hill, 216.
[54] 9 Wall, 13.
[55] Parker v. Bedwell, 3 Conn. 81.
[56] Sheers v. Brooks, 2 H. Black, 120.
[57] Reed v. Case, 4 Conn. 166.
[58] Bruce v. Colgan, 2 Litt S. Cas. 284.
[59] State v. Le Corf, 1 Bailey, 410.
[60] Commonwealth v. Bronson, 14 B. Mon. 361.
[61] Schneider v. Commonwealth, 3 Metc. (Ky.) 409.
[62] Rountree v. Wadell, 7 Jones L. 309.
[63] State v. Burnham, 44 Maine; Weese v. People, 19 Ill. 643; Lorrance v. State, 1 Carter, Ind. 359; McGuire v. State, 5 Porter Ind. 65.
[64] Commonwealth v. Johnson, 3 Cush. 454.
[65] Dillingham v. United States, 2 Wash. C. C. 422.
[66] Kiser v. State, 13 Ind. 80.

Remission of Forfeiture.—The power of courts to remit a forfeiture, upon the subsequent appearance of the principal has been denied.[67] But Chief Justice Marshall claimed that such power exists. "Such power," he said, "is not an unreasonable one. The object of a recognizance is not to enrich the treasury but to combine the administration of criminal justice with the convenience of the person accused, but not proved to be guilty. The real object of the recognizance is effected and no injury is done. If the accused prove innocent, it would be unjust in the government to exact from an innocent man a penalty, intended only to secure a trial. If he be found guilty, he must suffer the punishment intended by law for the offense, and it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial."[68]

It has been also claimed that enabling statutes were unconstitutional in that they infringed upon the executive power of pardoning, but the objections were held not well taken.[69]

ELISHA GREENHOOD.

St. Louis, Mo.

[67] Per Cranch, C. J., in United States v. Cookendorfer; Commonwealth v. Thornton, 4 Bibb. 383; Same v. Runion, 3 Metc. (Ky.) 3; State v. McNeil, 18 N. J. L. 333.

[68] United States v. Teely, 1 Brock, 255.

[69] Commonwealth v. Thornton, 4 Bibb. 380.

EQUITY—RECEIVER—RAILROAD COMPANY—LIABILITY OF BOTH—PRACTICE.

DAVIS v. DUNCAN.

United States Circuit Court, S. D. Mississippi, March, 1884.

1. A receiver is not personally liable for the torts of his employees; it is only when he commits the wrong himself that he is personally liable.

2. Proceedings against a receiver for the torts of his employees, is in the nature of a proceeding *in rem*, and renders the property held by him as receiver liable in compensation for such injuries.

3. A railroad company is not liable for injuries inflicted by a receiver or his servant, while its property was in the possession of a receiver, and when it was out of the possession of the property and had no control over it.

4. After entering an order discharging a receiver, and directing him to turn over the property in his hands to the defendant corporation, and which order was complied with by the receiver, the court cannot, after the adjournment of the term at which the order was made and entered of record, in any way alter, change, modify or expand the decree discharging the receiver, and again obtain jurisdiction over the property and funds which it had by its decree ordered the receiver to turn over to the corporation.

5. The fact that the receiver was also the president of the corporation can make no difference. It is the corporation that holds the property and not the president; he is only the official agent of the corporation.

6. If the decree discharging the receiver, and under which the property was turned over to the railway company, had provided that it should be subject to the satisfaction of all claims, whether for personal injuries committed by the employees of the receiver, or for other claims arising while the property was under his control, and whether the receiver was discharged or not, the court as a court of equity, would provide for a proper adjustment and payment of such claims, as such a provision would have been a retention of jurisdiction of the cause to that extent.

7. Although permission has been granted by a court to sue its receiver, the right of the receiver to set up any defense he may have is reserved; and this can be done by plea, answer or demurrer.

L. T. Bradshaw and *L. Brame*, for complainant; *E. L. Russell*, *B. B. Boone* and *Frank Johnson*, for defendants.

HILL, D. J., delivered the opinion of the court:

The questions for decision in this cause arise upon defendant's demurrer to complainant's bill. The bill in substance states and charges that defendant Duncan, in a suit in equity pending in this court, was duly appointed a receiver of the Mobile and Ohio Railroad, and the property belonging to said company; that acting as such, he was, on the 19th day of January, 1883, engaged by his agents servants and employees as a common carrier of passengers for hire over said road; that complainant was a passenger on one of the trains, having paid his fare to the town of West Point on said road; that the night was dark when the train arrived at that place, and there were no lights to enable passengers to see in getting off the train; that whilst attempting to get off the train, without any signal, the train made a sudden start, which caused a jerk, by which he was suddenly thrown against the platform, and his thigh bone was broken, and other injuries were inflicted upon his person and from which he has suffered much pain of body and mind, and has been at great expense in being cured of these injuries, some of which he fears may attend him through life; and that in consequence of these injuries he has been unable to attend to his business affairs, and has thereby been ruined in fortune, and has suffered damage to the sum of fifteen thousand dollars by reason of the negligent and wrongful acts of the conductor, engineer, and employees of said Duncan, and for which he claims damages in the said sum of fifteen thousand dollars.

The bill further charges that on the 10th day of February, 1883, in the matter of said receivership,

a decree was made and entered in this court, approving and confirming all the accounts and dealings of said Duncan, and accepting his resignation and discharging him as receiver, upon condition that he should produce and file, in this court, the acquittance and receipt of said Mobile and Ohio Railroad Company in full settlement as set forth in said decree, but that he has not done so, as complainant is informed and believes and charges that said resignation has not been accepted, and said receiver discharged.

That said Duncan in applying for his discharge, led the court to believe that all matters, except pending suits, by and against him as receiver, had been settled, and that, therefore, it was unnecessary to continue said receivership except for the purposes of pending suits or actions, and that said Duncan must be held chargeable with knowledge of his, complainant's, said injuries, and his right to compensation out of the property and assets in his hands as such receiver, and that he did not bring notice of the same to the court when said order of discharge was made, and that complainant had no notice of the proposed surrender of said receivership, and never did have notice of said proceedings until shortly before the filing of this bill on the 28th of December, 1883, and insists that he ought not to be affected by the same.

The bill further alleges that said Duncan was the president of said Mobile and Ohio Railroad Company, and one of its directors at the time of the injuries, and at the time of the surrender of said railroad and its property, and still is; that a large portion of the railroad and property so surrendered is in the State of Mississippi, and in the possession of said Duncan, and that the rights of no third parties have intervened. These are all the charges in the bill that need be stated to an understanding of the questions presented by the demurrer.

It is agreed that in considering the demurrer, the decree discharging the receiver as entered, may be considered by the court as if set forth in the bill. The proceedings in this court were in aid of and ancillary to the proceedings in the Circuit Court of the United States for the Southern District of Alabama, where the main suit was instituted and terminated; consequently this court adopted as its decree the decrees of that court, so far as they related to settling the rights of the parties to the suit and the discharge of the receiver, settling only by its own independent decrees the rights and liabilities growing out of the receivership between the receiver and third parties within the jurisdiction of this court. The decree of the said Circuit Court for the Southern District of Alabama was made on the 24th day of January, 1883, and recited that said Duncan, as receiver, had fully accounted with the court for all his acts as such receiver, and was ready to surrender all the property in his hands as such and which the railroad company was ready and willing to receive. Whereupon the court "ordered, adjudged, and decreed, that said William Butler Duncan do, with all convenient speed, deliver all the property in his possession as receiver, under the former order of this court, in the States of Alabama, Mississippi, Tennessee and Kentucky to the said Mobile and Ohio Railroad Company, to be by said corporation managed and operated as authorized by its charter, and upon the filing in this court by said Duncan of the acquittance and receipt of said railroad company as directed by the former order of this court, the resignation of said receivership by said Duncan is hereby accepted, and he and his sureties forever discharged from all liability as said receiver, except that all pending actions and suits, by or against said receiver shall be carried on and prosecuted to conclusion the same as if the said Duncan continued the receiver of this court, in this cause."

This decree was received and adopted and entered by this court as ancillary to, and in aid of, the proceedings in said cause in that court, on the 10th day of February, 1883. The bill admits that the property in the hands of the receiver has been turned over to the railroad company and that the acquittance and receipt was filed in that court before the filing of the bill in this cause, but that the acquittance and receipt has not been filed in this court. It is not denied that the bill sets forth a *prima facie* claim for damages, unless the right to recover the same has been lost by the surrender of the trust property and assets by the receiver, and his discharge before the commencement of these proceedings. The turning over of the property and filing the acquittance and receipt in the court at Mobile, was under the decree of that court a complete discharge of the receiver, except as to pending suits by and against Duncan as receiver. This court only entertaining jurisdiction of the case in aid of and ancillary to the proceedings in Mobile, and only for the purpose of settling controversies between the receiver and third parties growing out of the receivership, the filing of the acquittance and receipt of the railroad company in this court was unnecessary and unimportant, and the want of which did not, in my opinion, continue the liability of the receiver or render the property and assets turned over by him liable for any of the acts or wrongs committed by him or his employees.

As to all pending suits in whatever form, by or against Duncan, as receiver, in the Circuit Court of the United States in Alabama, or in this court, the receivership and the right to prosecute such suits to a conclusion was reserved, and any decree or judgment against the receiver became a charge against the property and assets so turned over, in the same manner that it would have been had the order of discharge never been made in either court. In other words, the railroad company took the property *cum onere* as to these claims. A receiver, as such upon principle and authority, is not personally liable for the torts of his employees. Were he so liable, few men would take the responsibility of such a trust; it is only

when he himself commits the wrong that he is held personally liable. The proceedings against him as receiver for the wrongs of his employees is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries. O'Meara v. Holbrook, 20 Ohio St. 137; Klein v. Jewett, 11 C. E. Green, 474; Jordan v Wells, 3 Woods, 527; Kennedy v. Indianapolis, etc. R. Co., 11 Cent. L. J. 89. The railroad company is not liable for the injuries complained of in the bill, for the reason that they were committed whilst it was out of the possession of the property, and had no control over it. This conclusion is sustained by principle and authority. Ohio, etc. R. Co. v. Davis, 23 Ind. 560; Bell v. Indianapolis, etc. R. Co., 53 Ind. 57; Metz v. Buffalo, etc. R. Co., 58 N. Y 61; Rogers v. Mobile, etc. R. Co., 17 Cent. L. J. 290; O'Meara v. Holbrook, 5 Am. Rep. 633; s. c., 20 Ohio St. 137. There is no allegation in the bill that Duncan had any ageny in bringing about the injuries complained of or knew anything in relation thereto, when either the decree of the court at Mobile, or of this court, discharging him as receiver was made, and it is to be presumed that he did not have personal knowledge of the occurrence, or that any claim was intended to be made for damages therefor. I take it for granted that it was supposed that there were no claims for damages against the receiver, or rather against the property or funds in his hands which had not been put in suit, or a reservation would have been made holding the funds and property liable, as was done in favor of those in suit. I am satisfied that such was the case, or cases, like the present one would have been provided for by the decree of this court in discharging the receiver, as was done in the case of the Mississippi Central Railroad Company.

It is very much to be regretted that this provision was not made, as it may work a serious wrong to the complainant; but the question is, can this court after the adjournment of the term at which the order was made, in any way alter, change, modify, suspend or expand the decree discharging the receiver, and again obtain jurisdiction over the property and funds which it had by its decree ordered the receiver to turn over to the corporation, and which it is admitted was done. I am not aware of any rule by which this can be done. I do not believe that the fact that Duncan is the president of the corporation can make any difference. It is the corporation that holds the property, and not Duncan; he is only the official agent of the company. The corporation took the property free from any liens or claims growing out of the receivership, except those reserved and provided for by the decree under which the surrender was made to the company, and under which it is now held.

Had the decree under which the property was turned over, provided that it should be subject to the satisfaction of all claims, whether for personal injuries or otherwise, committed by the employees of the receiver whilst the property was under his control, whether the receiver was discharged or not, this court as a court of equity would provide for a proper adjustment and payment of such claims, as such a provision would have been a retention of jurisdiction to that extent.

The only authority referred to by complainant's counsel in support of the proposition that the discharge of the receiver does not operate as a discharge from liability the property held by him for torts committed before the discharge, is the case of Miller v. Loeb, 64 Barbour, 454, referred to by High on Receivers, secs. 268 and 848. When this case is examined it will be found not to apply to the present case. The rule stated in that case is that the discharge of a receiver by order of the court is no bar to an action against him by third persons claiming property, of which he has taken possession, when it is alleged that the receiver has sold such property after notice of the owner's claim thereto, the court will permit the owner to bring an action against the receiver notwithstanding he has been discharged especially where the claimant had no notice of the receiver's application for discharge. This was a case in which the receiver had possession of the property of another and with knowledge of his claim, sold the property. In the present case, the property in the hands of a receiver, and which he turned over to the company in obedience to the order of the court, never was the property of the complainant, and could only be reached by the establishment of the claim for damages in such way as the court might direct, and obtaining the order of the court that the same should be paid by the receiver out of the trust property in his hands. This was not done and the property is now beyond the jurisdiction of this court. It is insisted by complainant's counsel that a receiver occupies the position of an executor of an estate, and that the courts have holden that the discharge of an executor does not relieve him from liability from suit when the discharge is granted; in that case the judgment is against the executor in his fiduciary capacity, but must be satisfied out of any of the funds belonging to the estate in his hands, if any he has, if not may be satisfied out of such property or means as may have passed into the possession of the devisee or legatee and upon which the creditor had a lien created by law for payment of his demand, the devisee or legatee having taking the property *cum onere*.

In the case at bar this relation and liability does not exist as above stated. The only authority to which I have been referred or have been able to find analgous to the present case is the case of the Farmers Loan and Trust Company v. the Central Rail-Road of Iowa, reported in the 7th Federal Reporter page 537 in which Judge Love, in the Circuit Court of the United States for Iowa, in a very learned and exhaustive opinion holds, that no action can be maintained against the receiver of a rail-road after such officer has been

discharged and the property transferred to a purchaser under an order of the court in a foreclosure proceeding; and that such purchaser takes the property subject to all claims against the receiver when the court has reserved the jurisdiction upon final decree to enforce as a lien upon the property, all liabilities incurred by such receiver. This opinion was concurred in by Judge McCrary, Circuit Judge. This ruling does not conflict with the positions stated. It is contended by complainant's counsel that to deny the relief prayed for is to acknowledge a right and deny a remedy, which it is insisted is contrary to legal rules. Rights are often defeated for the want of applying the proper remedy within the proper time and under which hardships are sometimes suffered, but complainant may not be altogether remediless, the employee or employees who caused the injury if the receiver or the property once in his hands was liable, are also liable as having been the direct and wrongful cause of the injuries; the fruits of a suit against them, it is true, may be very uncertain. It is insisted by complainant's counsel that the court, or one of its judges having given leave to file the bill against the receiver, should not now dismiss it, but will permit the cause to proceed to final decree, as though the receivership remained. In all such cases the leave to bring suit in any form, reserves the right to the receiver to set up any defence he may have, which can be done by plea, answer or demurrer. Jordan v. Wells, 3 Woods 527.

After a careful consideration of all the questions involved, I am unable to come to any other conclusion than the one that the bill does not present a case authorizing the court to grant the relief prayed for in the bill. Whilst at the same time I regret that the final decree did not provide for this and all other claims against the receiver, or the property and funds which were in his hands, and to which it would have been liable had proceedings been pending when the final decree was entered. The result is that the demurrer must be sustained and the bill dismissed.

EXTRADITION — HABEAS CORPUS — FEDERAL AND STATE COURTS — CONCLUSIVENESS OF GOVERNOR'S CERTIFICATE — FUGITIVE FROM JUSTICE.

MOHR'S CASE.

Supreme Court of Alabama, March, 1884.

1. An arrest by an agent of the governor of one State who has required the governor of another to surrender to him a fugitive from justice, is in no sense an arrest by the Federal Government.

2. The State courts may inquire by *habeas corpus* into the validity of the arrest.

3. While the certificate of the governor as to the finding of the indictment can not be disputed, the prisoner may disprove the statement that he is a fugitive by evidence that he was never in the State wherefrom the requisition has come, although such evidence also tends to prove that the indictment was unfounded.

4. To warrant extradition, a crime must not only have been committed, but the accused must be a fugitive from the State whose governor requires his custody; and he can avoid such demand by proof that he has not been within the bounds of such State since the commission of the crime.

5. One who but constructively commits a crime in a State, but has never been corporeally within its bounds, is not a "fugitive from justice" from that State.

SOMERVILLE, J., delivered the opinion of the court:

The purpose of the present application is to vacate the action of the probate judge discharging, one Alexander Mohr from alleged illegal custody on his petition for the writ of *habeas corpus*. The return to the writ showed that the petitioner was held in the custody of the defendant, Frederick Gentner, as agent of the State of Pennsylvania, under a warrant of arrest issued by authority of the Governor of Alabama, pursuant to a requisition from the Governor of the former State, demanding his extradition as a fugitive from justice. The crime charged is that of obtaining goods by false pretences. The probate judge permitted evidence to be introduced showing that the prisoner was not in the State of Pennsylvania at the time of the commission of the alleged offense, and had never been there since; that the goods were obtained by purchase from an agent of the prosecutor in the State of New York to whom the false representations, if any, were made, and that the petitioner had never fled from the State of Pennsylvania and was not a fugitive from justice. It is claimed that the State courts have no jurisdiction of the case, and if so that the probate judge had no jurisdiction to go behind the warrant of the Executive, to investigate the question as to whether or not the prisoner was in fact a fugitive from justice, and that the proceedings before him were *coram non judice* and void.

The questions thus raised for our consideration involve a construction of the clause in the Federal Constitution relating to the extradition of fugitive criminals between the several States, and of the law of Congress enacted for the purpose of its enforcement.

The Constitution of the United States provides, that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Art. IV, Sec. 1.

The act of Congress designed to carry this constitutional provision into effect, was passed in the year 1793, and is found substantially embraced in section 5278 of the Revised Statutes of the United

States. It provides that "whenever the Executive authority of any State or Territory demands any person as a fugitive from justice, of the Executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found on an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor, or chief magistrate of the State or Territory from where the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled, to cause him to be arrested and secured, and to be delivered" up to the "agent" of the demanding State or Territory. Rev. Stat. U. S. sec. 5278.

The General Assemby has seen fit to enact statutes in this State which are designed to be in aid of this Congressional legislation, and impose the duty of extradition upon the Governor in all cases falling within the purview of the Federal Constitution. Code 1876, secs. 3977-3990. It is needless that we should refer to these in detail.

It is not denied that the great function of the writ of *habeas corpus* is the liberation of those who may be imprisoned without just authority of law. But it is contended that this is a case of which the State courts have no jurisdiction, because the petitioner is shown to have been in the custody of one holding him under the authority of the laws of the United States, and who must be regarding as acting *pro hac vice* as an officer or agent of the Federal Government. The argument seeks to bring this case within the principle settled in Tarble's Case, 13 Wall. 397, decided by the Supreme Court of the United States in 1871, and holding that no judicial officer of a State has jurisdiction to issue a *habeas corpus* for the discharge of any person "held under the authority, or claim and color of authority of the United States by an officer of that government." The petitioner in that case was an enlisted soldier, in the army of the United States, who sought to be discharged from the custody of a recruiting officer of the Federal Government. The same principle had been virtually settled in Booth's Case, 21 How. (U. S.) 506, decided in the year 1858, a decision involving the validity of proceedings under the fugitive slave law.

The present case does not, in our judgment, come within the scope of the above principle, or the reason upon which it is based, which is to prevent a conflict of jurisdiction tending to a forcible collision between the State and Federal Governments. Tarble's Case, *supra*; *Ex parte* Le Bur, 49 Cal. 129; Code 1876, sec. 4936. The relator, Gentner, in whose custody the petitioner was shown to be, was not an officer or agent of the Federal Government. He was the agent of the State of Pennsylvania, whose executive had empowered him to make the demand upon the executive anthority of this State. It is no answer that the authority is exercised in obedience to an act of Congress, passed for the enforcement of the extradition clause of the Federal Constitution. This provision has been well said to be in the nature of "a treaty stipulation between the States of the Union," as binding upon the States as though it was a part of the Constitution of each State. Hibbler v. State, 43 Tex. 197. But in Kentucky v. Dennison, 24 How. 66, it was said that if the Governor of the State declined to surrender a fugitive criminal on the requisition of the Governor of a sister State, the Federal Government had no constitutional power "to use any coercive means to compel him." It was further asserted that this duty was "merely ministerial—that is to cause the party to be arrested and delivered to the agent or authority of the State where the crime was committed."

In Taylor v. Taintor, 16 Wall. 266, the duty to deliver or surrender was pronounced to be one "not absolute and unqualified," but dependent upon the circumstances of the case. As there said "in such cases the Governor acts in his own official capacity, and represents the sovereignty of the State. Possibly this executive duty may be regarded as *quasi* judicial in some of its aspects, but this, in our view, is not necessarily material in its bearing upon the question before us. The State has seen fit to legislate in aid of this Congressional legislation, rendering perhaps the duty of the executive one of more perfect obligation if possible. Code, 3977-78. And while it was said by Mr. Justice Story, in Prigg v. Commonwealth, 16 Pet. 339, that such legislation was prohibited by implication as to matters in reference to which Congress has already legislated, it seems now to be the better opinion that where State laws on this subject are not repugnant, but auxiliary to those passed by Congress, they may be upheld upon the principle of the right to exercise the power of domestic police. 1 Bishop's Cr. Proc., sec. 223; Spear on Extradition, 267; Hurd on Hab. Corp., 633-36; Work v. Corrington, 32 Am. Rep. 145. Congress has not designated the practice or mode of procedure by which the fugitive is to be arrested and secured, and as to this there can be no valid objection to State legislation. It is merely providing "adequate means and facilities for the accomplishment of such extradition." *Ex parte* Ammons, 34 Ohio St. 518; Coffman v. Keightly, 24 Ind. 509. However this may be, we are of opinion that Gentner was not the agent of the general government in any proper or legal sense, but of the executive authority of the State which made the demand for Mohr's extradition. *Ex parte* Gist, 26 Ala. 156-164. It has long been the general, if not universal practice of the State courts to exercise jurisdiction in such cases by issuing writs of *habeas corpus* in order to test the legality of the imprisonment. This jurisdiction is expressly recognized by sec. 4957 of the Code, and may now be considered as fully established upon unassailable grounds throughout the various States. This court does not aspire to the ambition of being the

first and perhaps only one of the State tribunals of last resort to assail or deny a jurisdiction which is not only just to the constitutional sovereignty of the State, but favorable to the preservation of the citizen's liberty, and which is at the same time otherwise so salutary in its juridical influences, as well as honorable in its antiquity. Spear's Law of Extrad. 296-306; Cooley's Const. Lim. (5th ed.), 16, note 1; Hurd on Hab. Corp., 621-632; Rorer on Inter-State Law, 223; Whart. Cr. Pl. & Pr. (8th ed.), sec. 35; Code of Ala. 1876, sec. 4936; Conem v. Hall, 75 Mass. 262; *Ex parte* Thornton, 9 Tex. 625.

We encounter more difficulty in the solution of the other question presented. Is it permissible to show that the case is not one coming within the provisions of the Constitution and Act of Congress, because the party charged is not a fugitive from justice, having committed the alleged offense if at all, only constructively while outside of the territorial jurisdiction of the demanding State? Or are the papers in the case, in connection with the warrant of arrest issued by the governor of this State, to be regarded as importing absolute verity in this particular, so as to be incapable of contradiction?

The statute provides, that, if the return to the writ of *habeas corpus* shows that the petitioner is "in custody for any public offense, committed in any other State or Territory, for which, by the Constitution and Laws of the United States, he should be delivered up to the authority of such State or Territory," he should be remanded. Code 1876, § 4967. This is, perhaps, merely declaratory of what the law would require in the absence of the statute. The power claimed by the prisoner is the right to show that his case is one outside of the class of cases intended to be covered by the Constitution and Laws of the United States.

The authorities are not in harmony as to what questions can be reviewed by the writ of *habeas corpus* in cases of extradition. It seems very certain that there is no power to go behind the indictment or affidavit, with the view of investigating the question of the prisoner's guilt or innocence. *In re* Clark, 9 Wend. 212. He can not be put upon trial for the crime with which he is charged, nor can any inquiry be made into either the merits of his defence, or mere formal defects in the charge. These inquiries are reserved for the court of the demanding State having jurisdiction of the offence. People v. Brady, 56 N. Y. 182; Robinson v. Flanders, 29 Ind. 10. Congress has seen fit to adopt special legislation regulating this phase of the evidence in the case. The act of 1793 makes conclusive the production of a copy of the indictment found, or an affidavit made before a magistrate of the demanding State, "charging the person demanded with having committed treason, felony or other crime," certified as authentic by the governor of such State. U. S. Rev. Stat., § 5278. These papers, if in due form, are made conclusive evidence of the guilt of the accused, when assailed on *habeas corpus*. It may be considered, therefore, as the settled doctrine of the courts that a *prima facie* case is made where the return to the writ of *habeas corpus* shows: (1) a demand or requisition for the prisoner made by the Executive of another State from which he is alleged to have fled; (2) a copy of the indictment found, or affidavit made before a magistrate charging the alleged fugitive with the commission of the crime, certified as authentic by the Executive of the State making the demand; (3) the warrant of the governor authorizing the arrest. Where these facts are made to appear by papers regular on their face, there is a weight of authority holding that the prisoner is *prima facie* under legal restraint. Spear's Law of Extrad., 208-303; *In re* Clark, 9 Wend. 212; State v. Schlem, 4 Harring, 377; *In re* Hooper, 52 Wis. 699; Peoples v. Brady, 56 N. Y. 182; Bumps Notes of Const. Dec., 295-297; Johnston v. Riley, 13 Ga. 97.

Many of the cases hold that the warrant of the governor reciting these jurisdictional facts, is itself *prima facie* sufficient to show that all the necessary prerequisites have been complied with prior to its issue by him; although as to this proposition there is a conflict of opinion. Davis case, 122 Mass. 324; Kingsbury's case, 106; *Ib.* 223; Robinson v. Flanders, 39 Ind. 11; Hartman v. Aveline, 63 Ind. 344. Which of these is the correct view we need not decide, as all the proper papers in due form are set out in the return made to the writ by the respondent, Gentner, who is the relator in this proceeding.

It is obvious that the extradition clause of the Federal Constitution has reference only to a special class and not to all criminals. Its language is person charged with any crime "who shall flee from justice and be found in another State." Art. iv sec. 2. The act of Congress is more emphatic if possible in describing such person as an actual fugitive, characterizing him as one who "has fled," and the State in which he is found as the State to which he "has fled",—Rev. Stat. U. S., sec. 5278. It may be considered clear, therefore, without any conflict of authority that the Constitution and laws of Congress do not provide for the extradition of any persons except those who may have fled from or left the demanding State as fugitives from the justice of that State.—Whar. Cr. Pl. and Pr. (8th Ed.) 31 and cases cited; Spear's Law of Extrad. 273, 310; 316. "The offense," says Mr. Cooley, "must have been actually committed within the State making the demand, and the accused must have fled therefrom."—Cooley's Const. Lim. (5th Ed.), 17 note.

There is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal, but the better view, perhaps, is that any person is a fugitive within the purview of the Constitution "who goes into a State, commits a crime, and then returns home,"—Kingsbury's Case, 106 Mass. 223; Hurd on *Hab. Corp.* 606. In the case of Voorhees, 3 Vroom, 141, he was characterized as one "who commits a crime in a State and withdraws himself from such juris-

diction." This point, however, we need not decide, as it is shown that the prisoner, Mohr, has never been into the jurisdiction of the demanding State since the commission of the alleged crime. He cannot, therefore, be said to be a fugitive from the justice of that State.

It is clear to our mind that crimes, which are not actually but are only constructively committed within the jurisdiction of the demanding State. do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule unless the criminal afterwards goes into such States and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have "fled" from a state into the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or the spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty instead of mere comity between the States. The language of the Constitution and law of Congress are entirely free from ambiguity on this point, being too obvious to admit of a judicial construction, and the authorities are uniform in the adoption of this view as to its manifest meaning. Whart. Cr. Pr. & Pl. (8th Ed.) §31. Spear's Law of Extradition 309, 316; Voorhees case, 3 Vroom (N. J.) 147, Kingsbury's case, 106 Mass. 223. *Ex parte* Smith, 3 McLean (U. S.) 121; Wilcox v. Nolze, 34 Ohio St. 520.

We are of opinion that it was never intended by Congress in their enactment of the law of 1793, that the finding of a Governor of a State that one is a fugitive from justice should be conclusive evidence of the fact, incapable of contradition by facts showing the contrary. It is an important feature of the law, throwing some light upon its proper construction, that while it expressly prescribes the mode by which evidence of the crime charged shall be authenticated, it no where prescribes how the fact that he is a fugitive from justice shall be established. There seems to us to have been a good and sufficient reason for this distinction. Nothing was more proper than the policy of precluding the fugitive from disputing the certified records from the courts of a sister State in view of the constitutional requirement that "full faith and credit" shall be given in each State to the records and judicial proceedings of every other State.—Cons't. U. S. art. 4 §1. But no such reason applies to the implication of the defendant's being a fugitive, because he is found in another State than the one in whose courts the charge is pending. It may be asserted that it was within the power of the Governor to investigate this fact before he issued the warrant so as to satisfy himself of its truth. Perhaps this is the correct view, but this duty must in its very nature be discretionary. In practice the fact of the criminal's flight is usually shown by affidavit, but this cannot be regarded as conclusive upon any principle known to us, in the absence of statutory regulation so declaring the law. The better view seems to us to be that one of the purposes of pretermitting express congressional legislation on this point was to refer the matter to executive determination, subject to review by *habeas corpus* in the courts in all proper cases. The papers being regular the Governor has a right to suppose that *prima facie* case exists for a warrant, and the safer practice would seem to be that the accused should be remitted to the courts to establish matters of defense *aliunde* the record. Especially is this true in doubtful cases.

As we have said, the grounds of imprisonment in this class of cases are constantly reviewed by *habeas corpus* in the State courts. Whart. Cr. Pl. & Pr., sec. 35. It is just as material to show that the prisoner does not come within the law on the ground that he never fled from the demanding State, as on the ground that he is not the identical person intended to be indicted, or that there is no authenticated copy of the indictment, or other charge against him. All of these facts must concur before the law authorizes the requisition to be made, or the warrant of arrest to issue. They are jurisdictional facts in the absence of which the prisoner is excluded from the operation and influence of the law, and no extradition can be constitutionally authorized by congressional legislation. Whart. Cr. Pl. and Pr. (8th ed.), secs. 31, 34, 35.

This view is supported by the best considered cases, and parol evidence has been often admitted by the courts in proceedings by *habeas corpus* for the purpose of showing that the warrant of the Governor was improvidently issued under the mistaken belief that the prisoner was a fugitive.

The case of Wilcox v. Nolze, 34 Ohio St. 520, decided in the year 1878, was a case of this kind. The prisoner had been indicted in the courts of New York for obtaining goods by false pretenses. The Governor of that State sent a requisition to the Governor of Ohio demanding the prisoner's extradition as a fugitive from justice under the act of Congress providing for such cases, the papers all being regular in form. The prisoner was allowed, upon *habeas corpus*, to review the Governor's finding that he was a fugitive from justice. Parol evidence was admitted to show that the crime had been only constructively committed, and that had he never been in the demanding State, and could not therefore have fled from it. The court said: "Whether or not the accused committed the acts complained of, while actually present in the demanding State, is jurisdictional; and it is clearly competent, in such case, to show by parol evidence a defect in the executive power, however regular the extradition papers may be in matter of form."

In Hartman v. Aveline, 63 Ind. 344, the accused had been arrested under a warrant issued by the Governor of Indiana on a requisition from the

Governor of the State of Illinois charging him with the crime of obtaining goods by false pretenses in the latter State, to the custody of whose agent he had been delivered on demand. Upon the writ of *habeas corpus* being sued out, it was shown that the accused was not in the State of Illinois at the time of the commission of the offense, but in the State of Indiana, where he resided, and that he had not fled from the former State. It was objected that the State courts had no jurisdiction to go behind the warrant of arrest issued by the Governor, but the court held that there was nothing in the Constitution of the United States, or the laws of Congress which precluded the inquiry. It was said that the mere recitals in an executive requisition, in the absence of an affidavit showing an actual fleeing from justice, did not authorize the issue of the warrant.

The same view was taken by the Supreme Court of Iowa in Jones v. Leonard, 50 Iowa 105 (s. c. 32 Amer. Rep. 116) a comparatively recent adjudication. A statute of that State provided that requisitions for fugitive criminals should be "accompanied by sworn evidence that the party charged is a fugitive from justice." The evidence accompanying the requisition, consisted of an affidavit charging that the plaintiffs were "fugitives from justice," which the Governor determined to be sufficient. It was held that the prisoners after arrest, could review the conclusion reached by the Governor, and show that they were not fugitives from the State of Massachusetts, because the crime charged, which was obtaining goods by false pretenses, had been constructively committed by statements made in a letter written from the State of Iowa, the State of their domicile. The court decided that the extradition law of Congress did not apply to a case of constructive crime like that under consideration, and that it was competent for the State Courts to review the conclusion of the Governor. It was said by the court, "If the decision of the Governor is final and conclusive as to this question, it must be so as to all questions touching the extradition of a citizen under the Constitutional provisions above quoted.' And again, "The Governor of this State is not clothed with judicial power, and there is no provision of the Constitution, or law of the United States, or of this State, which provides that his determination is final and conclusive in the case of the extradition of the citizen." It was accordingly held by the court that the decision of the governor was only *prima facie* correct, and that it was reviewable by the courts on petition sued out by the prisoner for the writ of *habeas corpus*.

The case of Hibbler v. The State, 43 Tex. 197, is in harmony with the same view. While it was there held that the Governor of Texas *prima facie* had authority to issue his warrant of arrest, when the papers were regular, upon the mere representation in the requisition that the accused was a "fugitive from justice," it was decided that this was a question of fact which was disputable by proof to the contrary, showing that "the presumption upon which the Governor had acted was unfounded in fact, and that thereby this process was being perverted to his injury."

There are other decisions strongly corroborative of the same doctrine, but which we deem it unnecessary to review. *Ex-parte* Joseph Smith, 3 McLean, (U. S. C. C.) 121; Manchester's case, 5 Cal. 237; Rorer on Inter-State Law, 221-222.

We are cited by counsel to the case of *Ex parte* Swearinger, 13 S. Car. 74, as an authority adverse to the foregoing views. The point decided in that case was merely that the absence of an affidavit that the petitioner was a fugitive from justice was not fatal to the requisition, and from this conclusion the Chief Justice dissented in an opinion replete with the force of sound logic. The reasoning of the majority of the court in that case seemed to be based upon the false idea that a denial of the fact that the accused was a fugitive was in the nature of an *alibi* defense going to the merits of the indictment.

We are of opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence in order to establish the fact that the petitioner was not a fugitive from justice.

Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of *habeas corpus*, which has been often characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury as one of its chief corner stones in the structure of our judiciary system. It might justly be considered as alarming to announce that a writ, which has so frequently been used for centuries past to prevent the encroachment of Kings upon popular liberty, if inadequate for the just purpose for which it has been invoked in this case.

The application made by the relator must be denied.

BRICKELL, C. J., dissenting.

NOTE.—One of the points involved in this case seems to be same as that which arose in Robb's case, referred to by us recently as having been decided by the Supreme Court of California, and the United States Circuit Court for the District of California. Robb was the agent of the governor of Oregon to receive a man named Bailey, and arrested him. He was thereupon summoned by *habeas corpus* to bring Bailey before the Superior Court of San Francisco and show upon what grounds he held him. This he refused to do, returning that he held his prisoner in Federal custody under the Federal Constitution, and he was bound to answer to the Federal courts alone for his conduct. The Supreme Court of California held otherwise, and imprisoned him for contempt. (1 W. C. Rep. 255.) He thereupon took out a writ of *habeas corpus* in the Federal court, and that court sustained the prisoner's views of the question and ordered Robb's release. The latter court relied upon Ableman v. Booth, 21 How. 567, in which the same position seems to be taken by the United States Supreme Court; also Tarble's case, 13 Wall. 397. In Taintor v. Taylor, 16 Wallace, referred to by us in a recent article of ours, the con-

trary view seems to be taken. It was there held that an arrest under requisition is not a Federal arrest and, therefore, the arrest did not discharge the bondsmen. It is hard to reconcile these decisions, although it must be confessed that they arose under different circumstances. Judge Deady in *re* Doo Woon, 1 W. C. Rep. 333, held that the Federal courts had inquisitorial jurisdiction, by implication deciding that the State courts possessed none. As we said in a recent editorial, it is curious that a State court can not inquire whether one residing within its jurisdiction, is detained legally and justly. We are glad to learn that the Supreme Court of Alabama has in the principal case, adopted the view entertained by the Supreme Court of California, and sustained by us. [ED. CENT. L. J.]

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—CONTRACT WITH ADMINISTRATOR—RELEASE OF LIEN—SUIT IN REPRESENTATIVE CAPACITY.

1. An administrator brought suit in his representative capacity upon a contract with him to pay him for the estate, one-half of a judgment recovered by his intestate against third persons, provided he would recall the execution and release the land from the liens. *Held*, he properly brought the action as administrator. 2. It was further claimed that he had no authority to make the agreement to release, and therefore, defendant's contract was without consideration. *Held*, the bargain being advantageous to the estate, the defendant could not object and was bound. *Mosman v. Bender*, S. C. Mo., March 3, 1884.

2. ATTORNEY AND CLIENT—BREACH OF TRUST—SECURITY OF MORTGAGE.

That an attorney, instructed to invest a sum of money in a good bond and mortgage, took his wife's mortgage, if the money was placed in a mortgage on property which was a full security, is not in itself evidence of bad faith. so that an action for the conversion of the sum in the attorney's hands would lie, the security of the mortgage failing. *King v. MacKellar*, N. Y. Ct. App. Jan. 15, 1884; 17 Rep. 343.

3. AWARD—MISTAKE OF LAW—ARBITRATOR.

Although an arbitrator has entire control of all questions, yet if from his own review of the case, it appears that he took an erroneous view of the law, his award will be set aside. *Doig v. Holly*, Manitoba H. Ct., Feb. 4, 1884; 1 Man. L. J. 61.

4. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The enforcement, by the State, of a tax levied under a void law is a deprivation of property without due process of law, contrary to section 1 of the XIV amendment to the Constitution of the United States, and the Federal courts have jurisdiction. *The Dundee, etc. Co. v. School District*, U. S. C. C., D. Oregon, March 6, 1884.

5. CONSTITUTIONAL LAW—EX POST FACTO LAW.

Where after the commission of a simple assault, the legislature provides that under an indictment charging a felonious assault, the accused may be found guilty of a lesser offence if included in the greater, the accused in an indictment for felonious assault, and convicted of simple assault, can not object that the law as to him is an *ex post facto* law, as changing the common law rule as to him. *State v. Johnson*, S. C. Mo., March 17, 1884.

6. CONSTITUTIONAL LAW—IMPAIRING THE OBLIGATION OF A CONTRACT.

At the date of the execution of a note and mortgage, the law of the State required the mortgaged premises to be assessed at their full cash value for taxation; and afterwards an act was passed requiring the note and mortgage to be assessed at its par value for taxation, and exempting so much of the land from taxation. *Held*, that the latter act did not impair the obligation of the contract between the creditor and the debtor. *The Dundee, etc. Co. v. School District*, U. S. C. C., D. Oregon, March 6, 1884.

7. CRIMINAL LAW—INDICTMENT—SUFFICIENCY—ASSAULT—WHAT AMOUNTS TO.

1. An indictment for assault with intent to ravish, need not set out the manner or means of the assault. The general averment of assault is sufficient. 2. The defendant was discovered in bed where the prosecutrix, her husband and child were sleeping. He had removed the blanket from her person; he was detected stooping over her within a foot of her with a shirt on only; he was on his knees with her hands on each side of her. *Held*, sufficient evidence to sustain the indictment. *State v. Smith*, S. C. Mo., March 3, 1884.

8. CRIMINAL LAW—RIGHT TO BE CONFRONTED BY WITNESSES—CERTIFICATE OF FOREIGN NOTARIAL OFFICER.

The right of a prisoner to be confronted by the witnesses against him, is not infringed by the admission of a certificate of a foreign notarial instrument as evidence of facts properly stated therein by the notary as such officer. *May v. State*, Tex. Ct. App. Galveston Term, 1884; 3 Tex. L. Rev. 130.

9. CRIMINAL PRACTICE—JOINT LARCENY—VARIANCE—SEPARATE CRIMES.

Under an indictment against two for joint larcenies, neither of the defendants can be convicted of a larceny proved by the prosecution to have been committed by him only. *Commonwealth v. Jones*, S. J. C. Mass., 7 Mass. L. Rep., March 13, 1884.

10. EASEMENTS—ALLEY-WAY—WHAT IS.

An order to open and provide an alley-way is not fulfilled by providing a passage-way over the land where the alley should be, through a store-room, along which a person may pass by opening and closing doors and gates. *Hacke's Appeal*, S. C. Pa., Jan. 7, 1884; 14 Pitts. L. J., 315.

11. EQUITY—PRACTICE—RIGHT TO DISMISS BILL.
A complainant in equity has an absolute right to dismiss his bill, at any time before trial, just as a plaintiff at law may enter a non-suit. *Kempton v. Burgess*, S. J. C. Mass., 7 Mass. L. Rep., March 13, 1884.

12. EVIDENCE—PAROL—WAIVER.
A waiver of an instrument under seal may be established by parol evidence. *Herzog v. Sawyer*, Md. Ct. App., March, 1884, 12 Md. L. Rec., 19.

13. INSURANCE — CO-OPERATIVE LIFE — DESIGNATION OF BENEFICIARY.
Where a member of an insurance lodge, in accordance with the terms of his certificate designated upon the books of the lodge, his mother, as the recipient of the insurance money, and he became insane, and his mother died before him, his insanity did not excuse a further designation, but the money went according to the policy to the reserve fund, and not to him who was designated by the will of the insured to receive it in case of his mother's death. *Hellenburg v. Independent, etc.*, N. Y. Ct. App., Feb. 5, 1884; 25 N. Y. Reg., 541.

14. INSURANCE—TRUST DEED—INTEREST.
1. A trustee in a deed of trust has an insurable interest in the property distinct from that of the mortgagor, and a conveyance by the mortgagor of his interest, in no way affects the former's right to insure. 2. Where the trustee insures his interest, and the policy provides that, in case of loss, he shall assign his interest in the property to the extent of the loss paid, provided that the beneficiary's claim to recover his entire loan and charges, he can not recover for a loss, until he performs his agreement, even though the property is then not worth the amount of the debt secured less the amount the insured is liable to pay. *Dick v. Franklin Fire Ins. Co.*, S. C. Mo., March 3, 1884; S. C., 10 Mo. App., 346.

15. JUDGMENT—PARTNERSHIP — IMPROPER INDEXING— NOTICE.
A judgment entered and indexed in the name of a firm, without any designation of the individuals composing the firm, will be postponed to the claim of a subsequent lien creditor, without notice, whose judgment is properly indexed. But such defective entry may be remedied as to subsequent lien creditors, by actual personal notice to them of the judgment. *Hamilton's Appeal*, S. C. Pa., 14 W. N. C., 217.

16. MORTGAGE—USURIOUS LOAN—FORECLOSURE.
After foreclosure of a mortgage given to secure the fulfillment of a contract denounced by the Constitution and legislature of the State as usurious, it is too late for the mortgagor to object. *Hemphill v. Watson*, S. C. Tex., Galveston Term, 1884; 3 Tex. L. Rev., 133.

17. NATIONAL BANK — INSOLVENCY — STOCKHOLDER'S LIABILITY—TRANSFER.
A sold national bank shares to B, who sold to C. B, at the request of C, inserted on the transfer book of the bank the name of X, an irresponsible (or fictitious) person, as the transferee from A. The bank becoming insolvent, A was compelled in a Federal court to pay a large sum as the responsible owner of the stock on the books of the bank. In an action by A against B to recover his damage so suffered, *Held*, no recovery could be had, B having sold the stock to C, a responsible person, in good faith, and while the bank was "a going concern." *Lasassier v. Kennedy*, S. C. La. Jan. 21, 1884; 17 Rep. 335.

18. NEGOTIABLE PAPER—ACCOMODATION INDORSER —DIVERSION OF TO DIFFERENT PURPOSE—BONA FIDE HOLDER.
Where one indorses a check for the accommodation of the drawer, to enable him to obtain the cash from another banker and so to enable the drawer to pay a debt to such indorser with a part thereof and the indorsement is made upon the condition that it was to be cashed at such banker's, but the drawer instead transfers the same to a *bona fide* purchaser for value, the latter has a complete remedy against the indorser. *Arnold v. Caldwell*, Man. H. Ct. Feb. 4, 1884; 1 Man. L. J. 81.

19. NEGOTIABLE PAPER—DATE LEFT BLANK—MATURITY.
A note dated in June, and payable on the "first day of March," will be held payable on demand, and the bringing the suit is a sufficient demand. *Collins v. Trotter*, S. C. Mo. March, 17, 1884.

20. NEGOTIABLE PAPER—PROMISE TO ACCEPT DRAFT—REVOCATION—BONA FIDE HOLDER.
One may be liable as acceptor of a bill drawn in pursuance of a written promise to accept, and upon the faith of which one has advanced money, but where a party sent a telegram authorizing draft and another telegram withdrawing the authority, and the first telegram only was shown and on its authority a draft was negotiated, the drawee was not liable as acceptor. *First Nat. Bank v. Clark*, Md. Ct. App. March, 1884; 12 Md. L. Rec. 20.

21. NEGOTIABLE PAPER—PROMISSORY NOTE—CERTAINTY OF TIME OF PAYMENT.
"On or before March 12, 1882, I promise to pay A two hundred dollars, at City National Bank, with interest at ten per cent. per annum, value received. This note becomes due and payable when, if before March 12th, 1882, A, B & Co. shall dispose of a part or all their interest in the New York hotel, or when the interest of B may be disposed of," is in effect a promissory note, and is not affected by the provision appended to the body thereof. *Kiskadden v. Allen*, S. C. Col. 4 Col. L. Rep. 493.

22. NEW TRIAL—MISCONDUCT OF JUROR—MOTION IN ARREST OF JUDGMENT—PETITION.
A motion in arrest of judgment is the proper and only remedy for the misconduct of a juror. A petition for a new trial for such cause will not be entertained, although the misconduct was not discovered until too late to file a motion in arrest. *Brown v. Congdon*, S. C. Conn. 17 Rep. 330.

23. PARENT AND CHILD—LIABILITY FOR SUPPORT OF CHILD—DECREE OF CUSTODY TO MOTHER.
A father is not liable for the support of a child, after a decree of court giving the custody of it to the mother. His liabitity is commensurate only with his right of control. *Brow v. Brightman*, S. J. C. Mass., 7 Mass. L. Rep. March 13, 1884.

24. PARTNERSHIP—DEED OF ONE PARTNER BINDS FIRM WHEN.
A contract under seal made by one partner in the firm name does not bind another partner unless he previously assented to or afterward ratified the act—but the previous assent, or the subsequent ratification may be shown by parol or by circumstances, and need not be under seal, *Herzog v. Sawyer*, Md. Ct. App. March, 12, 1884, 12 Md. L. Rec. 19.

25. PAUPER—LIABILITY OF TOWN.

Where after due notice by plaintiff to chairman of defendant town of the condition of the paupers in his charge and his inability to support them, plaintiff is entitled tocompensation from defendant town for his support of them after such notice, in the absence of an express contract or agreement. *Davis v. Scott*, S. C. Wis. Feb. 29, 1884; 6 Wis. L. N. No. 147.

26. PLEADING—ADMISSION—WANT OF DENIAL—GUARDIAN AND WARD.

Under a statute which provides that in an action upon a written instrument, the signature of the defendant is taken to be admitted, unless he denies the genuineness thereof, under oath, a guardian of a lunatic has no power to make an admission binding upon his ward, and as the ward cannot answer, this statute can not apply to the case of lunatics, who are left as at common law. *Collins v. Trotter*, S, C. Mo. Mar. 17, 1884.

27. PRACTICE—DAMAGES IN REPLEVIN.

In assessing the damages of a defendant in replevin, the jury cannot give him counsel fees. *Mix v. Kepner*, S. C. Mo. Mar. 17, 1884.

28. PRACTICE—DISMISSAL OF ACTION.

A plaintiff can not dismiss an action of his own motion after the defendant has answered and averred matters upon which affirmative relief is asked, growing out of the transactions set forth in the complaint. *Clarke v. Hundley*, S. C. Cal. March 3, 1884; 2 W. C. Rep. 215.

29 PRACTICE—SERVICE OF NOTICE OF APPEAL.

An appeal from a judgment rendered in favor of the United States can not be perfected without service of notice upon the United States. Such service should be made upon the United States attorney; service upon his assistant is not sufficient. *Bennett v. S. C. Wash. Terr.*, 2 W. C. Rep. 213.

30. PRACTICE—WANT OF JURISDICTION—COSTS.

A court although having no jurisdiction over a case and dismissing it for that cause, has power to give the party prevailing on the motion to dismiss, his costs. *State v. Thompson*, S. C. Mo. March 17, 1884.

31. QUO WARRANTO—MISUSE OF CORPORATE FRANCHISES.

A railroad company which for five years neglects to construct the line named in its charter, and then condemns land for a railway wholly unsuited to the wants of the public, and for the benefit only of coal mines, should be ousted of its franchise. *State v. R. Co.*, S. C. Ohio Com., Jan. 29, 1884, 5 Ohio L. J., 208.

32. RECOGNIZANCE — INSUFFICIENCY OF INDICTMENT NO EXCUSE.

A failure of defendant to appear and answer precludes the sureties on his bond from questioning the sufficiency of the indictment. *Hester v. State*, Tex. Ct. App., Galveston Term, 1884; 3 Tex. L. Rev., 157.

33. SPECIFIC PERFORMANCE—PAROL SALE OF LAND—ABANDONMENT OF POSSESSION.

Where, under a verbal contract for the sale of land, possession has been taken by the vendor, and thereby a right of action for specific performance of the contract has accrued, if the possession be abandoned by him with intent to surrender all right and interest so acquired, the original possession thereby ceases to be available as a past performance; but where the possession is temporarily interrupted under such circumstances as indicate that the vendee does not intend thereby to waive or surrender his right of action, it will not be defeated thereby. *Drum v. Stevens*, S. C. Ind., March 14, 1884.

34. STATUTORY CONSTRUCTION—NOTES ISSUED FOR CIRCULATION—WHAT ARE.

Orders drawn by a mercantile corporation to pay to certain persons or bearer a certain number of dollars, in merchandise, at retail, issued to those who were willing to take their pay in merchandise, and as a means of convenience in exchange for produce, do not perform the office of money, and are not notes in the sense in which that word is used in the United States statutes providing "that every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per cent. on the amount of their own notes issued for circulation and paid out by them." *Zion, etc. v. Hollister*, S. C. Utah, 2 W. C. Rep., 202.

35. TAXATION—MORTGAGOR AND MORTGAGEE.

Under a statute relieving mortgaged land from double taxation, and providing for the assessment upon mortgagee and mortgagor of the value of their respective interests in the land, but making the whole tax a lien upon the land, a mortgagor who stipulates to pay "all taxes upon the land" is bound to pay the entire tax. *Hammond v. Lovell*, S J. C. Mass., 7 Mass. L. Rep. March 13, 1884.

36 TROVER—DEMAND—SUFFICIENCY.

Although it is necessary to make a sufficient demand to found an action for trover, that the plaintiff be prepared to take the property if the demand is complied with, yet, if the only answer to the demand is a denial of ownership in the plaintiff, this is a waiver of any objection to the sufficiency of the demand. *Edmundson v. Bric*, S. J. C. Mass., 7 Mass. L. Rep. March 13, 1884.

37. VENDOR'S LIEN—WAIVER—TAKING NOTE—COVENANT—DOWER—BREACH—EVICTION.

1. A vendee can not complain of a breach of covenants, because the release of a former owner's wife's dower had never been obtained, until she asserts her claim and evicts him. 2. A vendor's lien is not waived by taking the vendee's note, but, if independent security be added to it, it is *prima facie* waived. 3. But the mere fact that the substantial purchaser added "security" to his signature on a note given by him with his son and the latter's wife, to whom the deed was made, does not show such waiver. *Hunt v. Marsh*, S. C. Mo. Feb. 25, 1884.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

31. A testator gives "to the Board of Foreign Missions, and to the Board of Domestic Missions $10,-

000.'' Is this a gift of $10,000 to each? Please cite cases. J. H. S.
Trenton, N. J.

32. Can I be referred to a Missouri case which decides that, if an officer permits his prisoner to go at liberty upon his promise to pay the fine imposed by the court upon him, he can not afterwards re-arrest the convict upon his default in payment according to his promise? C.
Bismarck, Dakota.

CORRESPONDENCE.

Editor Central Law Journal:

Washington Law Reporter is quoted by the *Albany Law Journal* as saying ''that the appearance of the Supreme Court of the United States clothed in their gowns, has a salutary effect upon the citizen who goes into the presence of that august tribunal. * * * If gowns for the judges will give more dignity to a court, and enable it to command more respect from the public and the profession, why not have gowns?'' The American idea is that the respect paid to public functionaries should not be due to a livery or uniform. On whom is the gown to have this awe-inspiring effect? On Wm. M. Evarts perhaps, or Charles O'Connor, or George F. Edmunds. How absurd. Possibly the sight seekers at the Capital, coming unexpectedly into the little room where these judges preside, find the gowns quite a ''raree'' show, which inspires their curiosity to learn from their *Ciceroni* or the obliging ushers. the names of the Justices, but no lawyer who keeps in mind the real principles of American citizenship, but regrets to find anywhere in his county a court deriving respect from a uniform. If the livery is necessary for the information of the ignorant, then why not put all other officials in livery. The livery ought not to be necessary for the information of the judges themselves; they are to be judges in gowns or out. The American idea is to badge the servitors, the men who would not be known as such without the badge. We put postmen in uniform, but not the Postmaster General; we uniform the brakemen, but not the railroad presidents. If we are to have gowns we should gown the constables or the attorneys, and let the judges be known, as kings and ambassadors, by the simplicity of their attire as gentlemen, without livery or uniform. HOMESPUN.
Boston, Mass.

RECENT LEGAL LITERATURE.

AMERICAN DECISIONS. The American Decisions, Containing the Cases of General Value and Authority, Decided in the Courts of the Several States from the earliest issue of the State Reports to the year 1869. Compiled and Annotated by A. C. Freeman, Counselor at Law and Author of "Treatise on the Law of Judgments," "Co-tenancy and Partition"; "Executions in Civil Cases," etc. Vol. 50 & 51, San Fransisco, 1883: A. L. Bancroft & Co.

We hardly drop our pen in reviewing one volume of this series when we find another in our sanctum prepared to receive the same treatment. The volumes before us contain cases decided in 1845, 1846, 1847, 1 48, 1849 & 1850. The most valuable notes to cases in the fiftieth volume are upon Customs and their validity; Writs of Right; Mortgage or Conditional Sale; Ejectment by vendor against vendee in possession under contract of sale; Rules for computing interest; Marriage Settlements; Statutes of Limitations when constitutional; Certificates of Acknowledgments of Deeds, Sufficiency of; Bills of Peace; Necessity of Assent of Executor to Legacy; Election of Grantee where Deed may be taken different ways; Time when essence of the contract; Liability of Seller of forged note; Rescission of Contract, Duty of Party rescinding; Action on the case against Persons assisting Debtors in defrauding Creditors; Allowance of Exemplary Damages; Liability of Lessor to Tenant; Personal Liability of Agent upon Contracts made without authority. This is the most valuable volume which has passed through our hands. The most valuable notes in the fifty-first volume are upon Conspiracy, its Definition, Nature, General principles and particular phrases; Effect of Statute of Frauds, where it is part of the original Agreement to put the contract in writing; Writs of Assistance; Liability of Employer for acts of Contractor: Description of money in an indictment; Liability for Damage to others from Acts done on one's own land; Homicide deemed justifiable on ground of Self Defence; Judgment as Evidence in Creditor's suit; Discharge of Indorser by Indulgence to Maker or Acceptor; Assignment of Lease and Sub-letting, Distinction between; Distinction between Pledge & Mortgage; Liability of Master for Willful, Wanton, or Malicious Tort or Servant; Admissions by one of two joint Debtors; Acknowledgment or new Promise; Contracts by Corporation forbidden bycharter or by other Statute; Delivery of Donatio Causa Mortis; Aiding and Abetting crime: Inchoate interest of Croppers and others, not subject to execution; Extent of Sureties' Liability on Bonds; Parol Evidence to control Written agreement; Dower, when Barred by provision in Will; Equity Jurisdiction to recover Chattels; Assignments for Benefit of Creditors; Legislative journals when Evidence; and Resulting Trusts. If this volume had preceeded the last, we might have been tempted to give it the same compliment; but they are both excellent; and the practitioner who attempts to succeed without this series, should throw away his head. Mr. Freeman, we are ready for the next.

NOTES.

——Clerk of the court: ''Owen Doherty! Are you Owen Doherty?'' Prisoner, with a merry twinkle in his eyes: ''Yes, begorra, I'm owin' everybody!''

——A son of Erin, hit by an engine which broke his shoulder, sued the railway company for $5,000. The jury disagreed. At the next term of the court he settled for $360, saying that ''if he was hit agin he'd take a hundred dollars if it kilt him intoirly.''